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I
Introduction

Video games are currently the most popular mass-market entertainment in America.[1] It is estimated that five billion dollars was spent in 1981 alone by video game enthusiasts playing "Pac-Man," "Space Invaders" and "Missile Command."[2] Although the games are popular with some adults,[3] the biggest audience for these arcade amusements is teenagers between the ages of twelve and seventeen.[4] Counterbalancing the teen passion for video has been community concern; video mania has been blamed for everything from truancy and moral corruption to myopia and misspent lunch money.[5]

In some locales the upshot of this anxiety has been the use of newly drafted or recently revived anti-gambling, curfew and licensing ordinances to restrict video play.[6] For the most part, these ordinances are designed to confine the number of games in[7] and the location of [8] arcades, but a few ban adolescent video

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1. Bernstein, *Atari and the Video-Game Explosion*, FORTUNE, July 27, 1981, at 40; Latham, *Video Games Star War*, N.Y. Times, Oct. 25, 1981, at 100 (Magazine); Owen, *Invasion of the Asteroids*, ESQUIRE, Feb. 1981, at 58; *Games That Play People*, TIME, Jan. 18, 1982, at 50.

2. *See Games That Play People*, *supra* note 1 at 51.

3. *See* Owen, *supra* note 1, at 58.

4. Latham, *supra* note 1, at 51; Ziegler, *Regulating Videogames: Mixed Results in the Courts*, 34 LAND USE L. & ZONING DIG. 4 (1982).

5. *Games That Play People*, *supra* note 1, at 53; Scott, *Parents Voice Concern Over Video Game Centers*, Christian Science Monitor, Oct. 12, 1982, at 22.

6. For example:

> In Irvington, a New York City suburb on the banks of the Hudson, the village trustees recently debated a resolution that would prohibit the playing of coin-operated video games by anyone under 17. Parents complained that their children were cutting school and squandering their lunch money.

Bernstein, *supra* note 1, at 40.

7. *See, e.g.*, America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982) (interrelated licensing and zoning ordinances limiting number of devices permitted).

play altogether.[9] Because community restrictions on video games threaten huge potential profits,[10] coin machine vendors, arcade operators and other commercial interests have mounted several legal challenges to video game regulation.

This note first reviews the constitutional issues raised by video game regulations. It then discusses the recent court decisions concerning anti-gambling, curfew and licensing ordinances directed at video games. It contrasts the current challenges to video game regulations with past challenges to pinball, pool hall and bowling alley ordinances. Because these former hangouts of American youth are directly analogous to the modern video arcade, pinball, pool hall and bowling alley cases provide an historical framework within which to monitor the trend and probable direction of community video game regulation.[11] The final section of this note predicts the form and substance of effective video game regulations in the future. It suggests that carefully drawn and administered licensing statutes will satisfy the concerns of communities, withstand the challenges of commercial interests and endure the scrutiny of courts.

II
Constitutional Issues Raised by Video Game Regulations

Certain fundamental issues appear in virtually every opinion which evaluates community anti-gambling, curfew or licensing statutes. As recurring themes, these issues fall loosely into three categories. The first concerns police power: does the

8. *See, e.g.*, Malden Amusement Company v. City of Malden, No. 82-1840-S, slip op. (D. Mass. 1983) (amusement center's license denied to video game operator).

9. *See, e.g.*, Aladdin's Castle, Inc. v. Village of North Riverside, 66 Ill. App. 3d 542, 23 Ill. Dec. 289, 383 N.E.2d 1316 (1978) (licensing ordinance forbidding proprietor from permitting minors to use multiple play machines).

10. "Industry surveys indicate that there are estimated to be altogether between 3000 and 5000 operators, who operate possibly as many as 1,000,000 amusement games and jukeboxes in about 300,000 establishments . . . ." Brief of Amusement and Music Operators Ass'n, Inc. as Amicus Curiae in Support of Appellee, City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982).

11. *See generally* Annot., 89 A.L.R.2d 815 (1963) (coin-operated pinball machines or similar devices, played for amusement only or confining reward to privilege of free replays, as prohibited or permitted by antigambling laws); Annot., 100 A.L.R.3d 252 (1980) (Zoning or Licensing Regulation Prohibiting or Restricting Location of Billiard Rooms and Bowling Alleys). Indeed, many video games are located in pool halls, bowling alleys and former pinball arcades.

community have the power to enact restrictive legislation? The second concern is vagueness and overbreadth: does the proposed regulation contain phrases incapable of precise understanding or administration? The final concern is the protection of first amendment issues: does the regulation have the effect of inhibiting a basic right or a certain class of persons deserving of special protection?

A. Video Games and the Exercise of Police Power

A community's authority to regulate or prohibit video games stems from the exercise of local police power.[12] A community is typically, "empowered to enact such bylaws and ordinances as may be necessary and proper to preserve the health, quiet and good order of the town which includes, among other things, the power to restrain and prohibit [unwanted activities]."[13]

Gambling, curfew and licensing ordinances restricting the location or play of video games may be a valid exercise of community police power. However, the ordinances must meet a two-prong test; they must "tend in some degree to prevent offenses or preserve the public health, morals, safety or general welfare," and "the means chosen must be reasonably necessary for the accomplishment of the intended purpose and not unduly oppressive."[14]

Courts generally assume community ordinances are valid.[15] One seeking to rebut this presumption must show that the adopted ordinance has the motive or effect of being "arbitrary, capricious, and unreasonable" and that it "will not promote the

12. *See generally* 16 AM. JUR. 2D *Constitutional Law* §§ 259-264 (1964).

13. City of Barlett v. Hoover, 571 S.W.2d 291, 292 (Tenn. 1978) (discussing general validity of local ordinances while invalidating pinball prohibition conflicting with state statute).

14. Aladdin's Castle, Inc. v. Village of North Riverside, 383 N.E.2d at 1319 (1978) (upholding various pinball restrictions); *see generally* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. at 303 (1982) ("Rational Basis" appendix to the opinion of Powell, J., concurring in part and dissenting in part).

15. *See, e.g.*, City of Los Angeles v. Silver, 98 Cal. App. 3d 745, 159 Cal. Rptr. 762 (1979) (upholding ordinance forbidding establishment of an arcade: "In enacting zoning ordinances, the municipality performs a legislative function, and every intendment is in favor of the validity of such ordinances." *Id.* at 749); *see also* Village of Belle Terre v. Boraas, 416 U.S. 1, 4 (1974) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."). For use of community zoning ordinances in control of video games see generally Ziegler, *Regulating Videogames: Mixed Results in the Courts*, 34 LAND USE L. & ZONING DIG. 4 (1982).

safety or general welfare of the people."[16] Courts justify imposing this heavy burden by maintaining that it is not the job of the judiciary to "concern [itself] with the wisdom of legislation nor substitute [its] judgment for that of the Legislature."[17]

Because the power of local governments to enact restrictive legislation is almost universally accepted by the judiciary, commercial interests must attack the means through which communities exercise that power and the substantive effect of prohibitive legislation in order to overturn it.

B. The Means—Phrasing of Video Game Ordinances—Vagueness and Overbreadth

Ordinances directed at video games may be challenged because they are drafted in language that is either too indefinite to be understood or too sweeping to be judiciously applied. An ordinance is void for vagueness "if its prohibitions are not clearly defined" or if it does not give a person of ordinary intelligence reason to know what is prohibited.[18] Such an ordinance violates the due process clause of the fourteenth amendment, which requires that citizens be given notice of punishable conduct and that law enforcement be based on a standard more precise than individual official discretion.[19]

Yet, even if a statute is sufficiently exact to withstand a challenge of vagueness it may still be invalid on the basis of overbreadth.[20] An overbroad statute is one which "sweeps within its prohibitions what may not be punished under the First and Fourteenth amendments";[21] that is, a statute which, though not directed at constitutionally protected activities, may have the effect of burdening speech or association.

To mount a serious challenge based on overbreadth it is necessary to show both that a limitation on speech or association is an important part of the law's objective, and that there is no

16. Aladdin's Castle, Inc. v. Village of North Riverside, 383 N.E.2d at 1319 (1978); *see generally* City of Memphis v. Greene, 451 U.S. 100 (1981).

17. WNEK Vending & Amusements Co. v. City of Buffalo, 107 Misc. 2d 353, 434 N.Y.S.2d 608, 611 (N.Y. App. Div. 1980) (nevertheless court undertook an extended analysis of community anti-gambling ordinances as applied to video games); *see also* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

18. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

19. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

20. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 722 (1978).

21. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); *accord* NAACP v. Button, 371 U.S. 415, 433 (1963).

way the law can be retooled to serve only constitutionally permissible ends.[22] In the field of video game regulation, a challenge based on overbreadth is difficult to maintain in the courts. It must be premised on the assumption that video game regulation is aimed at expression protected by the first amendment[23] or that it is aimed at association worthy of constitutional safeguarding.[24] These and other issues concerning the essential rights which may be impinged upon by video game regulation are discussed in the next subsection of this note.

C. Constitutionally Protected Rights—Speech, Association and Property

1. *Speech*

The first amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ."[25] Courts have given wide latitude toward the type of social, political and artistic expression deserving of constitutional protection as "speech." By protecting most modes of expression, the courts hope to protect the free flow of ideas and information in our society.[26]

It is arguable whether video games can be construed as a form of expression worthy of the first amendment's protection. True, the games have been recognized as entertainment[27] and as copyrightable subject matter[28] but the significant elements

22. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24, at 711 (1978).

23. For cases in which this approach is discussed see Malden Amusement Company v. City of Malden, No. 82-1804-S, slip op. (D. Mass. 1983); Playtime Games, Inc. v. City of New York, 535 F. Supp. 1069 (E.D.N.Y. 1982); America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982); Caswell v. Licensing Commission for Brockton, 387 Mass. 864, 444 N.E.2d 922 (1983).

24. For cases discussing this approach see Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, *reh'g en banc denied*, 634 F.2d (5th Cir. 1980), *rev'd in part and remanded*, 455 U.S. 283, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982); Caswell v. Licensing Commission for Brockton, 387 Mass. 864, 444 N.E.2d 922 (1983).

25. U.S. CONST. amend. I.

26. The most famous expressions of this idea are found in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting) and, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., joined by Holmes, J., concurring). For a more recent expression of this idea see Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 564 (1975).

27. WNEK Vending & Amusements Co. v. City of Buffalo, 434 N.Y.S.2d 608, 617 (N.Y. App. Div. 1980).

28. Stern Electronics, Inc. v. Kaufman, 523 F. Supp. 635 (E.D.N.Y. 1981), *aff'd*, 669 F.2d 852 (2nd Cir. 1982) (audiovisual display of video game given copyright protection).

of communicating an idea or providing information seem to be lacking. As one court wrote in denying a preliminary injunction against an ordinance directed at video games:

> In no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element. That some of these games "talk" to the participant, play music, or have written instructions does not provide the missing element of "information." . . . [A]lthough video game programs may be copyrighted, they "contain so little in the way of particularized form of expression" that video games cannot be fairly characterized as a form of speech protected by the First Amendment.[29]

2. *Association*

Although the first amendment also provides for the "right of . . . people peaceably to assemble,"[30] most courts have not attempted to define the right of assembly or association independent of other first amendment rights.[31] Thus, while assembly is clearly a protected right within the context of political organizations,[32] religious groups[33] or concerted advocacy of some kind,[34] it is not necessarily a free-floating individual right. For instance, the Supreme Court has never extended the stringent protection given political, religious or legal affiliation to social association not connected to other first amendment activity.[35] A few lower courts have protected such social association by rigorously scrutinizing any law burdening friendly intercourse or public mobility.[36] In general, however, curfews and laws restricting social activity may, if sufficiently

29. America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170, 174 (E.D.N.Y. 1982). Other courts that have considered the issue have been in agreement, *see supra* cases cited at note 23. *But see* Oltmann v. Palos Hills, No. 82 CH 3568, slip op. at 13-14 (Ill. Cir. Ct. Aug. 20, 1982); Gameways, Inc. v. McGuire, N.Y.L.J., May 27, 1982, at 6, col. 2 (N.Y. May 3, 1982) (as cited in Caswell v. Licensing Commission for Brockton, 444 N.E.2d at 926 (1983).

30. U.S. CONST. amend. I.

31. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-23, at 700-702 (1978).

32. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14, 24-25 (1976) (per curiam).

33. *See, e.g.*, Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

34. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449, 460 (1958).

35. Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1041 (1980); *accord* Sunset Amusements Co. v. Bd. of Police Comm'rs of Los Angeles, 7 Cal. 3d 64, 74-75, 101 Cal. Rptr. 768, 773-74, 496 P.2d 840, 845-846 (1972).

36. *See* Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1041-42 (1980); Sawyer v. Sandstrom, 615 F.2d 311, 315-16 (5th Cir. 1980).

justified by state interest and drawn with requisite precision,[37] be affirmed as a valid exercise of police power without the strict scrutiny traditionally accorded laws abridging first amendment freedoms.

The gathering of teens and others in video arcades can most comfortably be categorized as social association.[38] Ordinances prohibiting video play and the establishment of arcades or limiting the hours of arcade access will probably withstand any challenge premised solely on a charge that they inhibit the "freedom of association." Unless these ordinances are defectively drawn[39] or impinge on other specially protected rights and/or groups,[40] they will retain their presumptive validity.

3. *Property*

The constitutional provision that no person shall "be deprived of . . . property without due process of law"[41] has not been an extended subject of controversy in video game regulation. For the most part, the granting or denial of video game licenses is usually preceded by notice and an administrative hearing.[42] This respect for due process insures that licensing statutes, which merely limit or tailor the presence of video games to a community's needs, do not infringe on the constitutional rights of those with a protectible interest in property.[43]

Curfews and age-based ordinances do pose a threat to the commercial value of video arcades and games as property.[44] It

37. *See generally* Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1264-65 (M.D. Pa.), *aff'd*, 535 F.2d 1245 (3d Cir. 1975), *cert. denied*, 429 U.S. 964 (1976) (scrutinizing validity of curfew ordinance directed at youths); Aladdin's Castle, Inc. v. Village of North Riverside, 383 N.E.2d 1316, 1322 (1978).

38. Caswell v. Licensing Commission for Brockton, 444 N.E.2d at 927 (1983).

39. *See supra* text accompanying notes 18-24.

40. *See infra* text accompanying notes 60-67.

41. U.S. CONST. amend. XIV.

42. *See, e.g.*, O'Neill v. Town of Nantucket, 545 F. Supp. 449 (D. Mass. 1982); L-Jo Amusements, Inc. v. City of New York, No. 81 Civ. 7823 (E.D.N.Y. March 1, 1982); America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982); Caswell v. Licensing Commission for Brockton, 387 Mass. 864, 444 N.E.2d 922 (1983); 1001 Plays v. Mayor of Boston, 387 Mass. 879, 444 N.E.2d 931 (1983); Gardiner v. LoGrande 83 A.D.2d 614, 441 N.Y.S.2d 288 (N.Y. App. Div. 1981).

43. O'Neill v. Town of Nantucket, 545 F. Supp. 449 (D. Mass. 1982) (discussing an application for licensing). For a discussion of what constitutes a protectible property interest deserving of due process see generally Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Medina v. Rudman, 545 F.2d 244, 250 (1st Cir. 1976), *cert. denied*, 434 U.S. 891 (1977). An approved license application may ripen into a protectible property interest, *see* Gardiner v. LoGrande, 83 A.D.2d 614, 441 N.Y.S.2d 288 (N.Y. App. Div. 1981).

44. *See supra* text accompanying note 4. Any regulatory statute aimed at video

is presumed, however, that on balance, such ordinances serve the public health, welfare, safety and morals in a manner which far outweighs the incidental commercial loss they may cause private interests.[45]

Only anti-gambling statutes, capable of making the possession of video games a criminal activity,[46] could cause a true forfeiture of property.[47] In recent court decisions, however, such statutes have seldom been deemed the appropriate regulatory device for video games. For the most part, the modern attitude toward electronic games characterizing them as games of skill, rather than as gambling games of chance,[48] removes the machines from the sphere of confiscable property. This recharacterization affords video game owners a claim for protection of property within the fourteenth amendment's guarantees of both due process and equal protection.

D. Equal Protection Under the Law

The Equal Protection clause of the fourteenth amendment has been liberally described as requiring that lawmakers treat "like things in a like manner."[49] But under the broad powers granted local governments by state constitutions,[50] communities may discriminate in their application of the law if there is a legitimate basis grounded in the public interest for doing so.[51]

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games which prohibits those under 17 from arcade egress, or any curfew which limits the hours minors may be abroad, cuts into a substantial share of the commercial market for video devices.

45. *See* Aladdin's Castle, Inc. v. Village of North Riverside, 383 N.E.2d 1316, 1322 (1978); Rothner v. City of Des Plaines, No. 81-C2669, slip. op. (N.D. Ill. Sept. 11, 1981).

46. *See, e.g.*, ordinance discussed in WNEK Vending & Amusements Co v. City of Buffalo, 96 Misc. 2d 983, 410 N.Y.S.2d 255 (N.Y. Sup. Ct. 1978), *rev'd*, 434 N.Y.S.2d 608 (N.Y. Sup. Ct. 1980); and ordinance discussed and considered inappropriate for video game regulation in State v. Bloss, 62 Hawaii 147, 613 P.2d 254 (1980).

47. *See, e.g.*, application of anti-gambling statute to pinball machines causing seizure and destruction of devices in State v. Pinball Machines, 404 P.2d 923 (Alaska 1965) (arguably these were ordinary pinball machines but because found capable of being manipulated for wagering they were confiscable property). Where pinball machines or other electronic devices have been used to provide customers with purely chance-dependent amusement they have also been deemed confiscable, *see, e.g.*, Merandette v. City & County of San Francisco, 88 Cal. App. 3d 105, 151 Cal. Rptr. 580 (1979). The *Merandette* opinion was affirmed by Gaming Device Defined, 65 Op. Cal. Att'y Gen. No. 2 (Feb. 1982).

48. *See* State v. Bloss, 62 Hawaii 147, 613 P.2d 354, 360 (1980); *see also infra* text accompanying notes 114-115.

49. City of Ferndale v. Palazzolo, 62 Mich. App. 140, 233 N.W.2d 216, (1975).

50. *See supra* text accompanying notes 12-17.

51. *See* State v. Bloss, 62 Hawaii 147, 613 P.2d 354, 358 (1980) "The Equal Protection

The charge of unfair discrimination and a denial of equal protection has been made by commercial interests in communities where electronic games have been classified as gambling devices.[52] A community may have legitimate reasons for prohibiting coin-amusements capable of use for wagering;[53] but video games, it has been argued, do not share enough in common with such devices to be reasonably so classified or regulated.[54] Additionally, the claim to equal protection can be made on the basis that a community which allows other legitimate games of skill such as bowling or billiards cannot arrive at any legitimate reason for discriminating against video games.[55] Some courts have respected these claims to equal protection for video games;[56] others recognize a valid public interest in limiting coin-amusements as outweighing the need for an evenhanded approach.[57]

E. The Rights of Youth

The last major constitutional issue present in video game regulation concerns the rights of minors to the same broad guarantees of freedom given adults under the constitution. Generally, courts subscribe to the maxim that "the constitutional rights of adults and juveniles are not co-extensive."[58] It is thus a valid exercise of the police power to regulate the activities of minors in a way which might not be permissible were it extended to adult behavior.[59]

Similarly, the special protections given certain groups of in-

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Clause does not prohibit the State from passing laws which treat different classes . . . differently, but only from treating classes differently when the basis of discrimination does not bear a rational relationship to a legitimate statutory objective."

52. *See infra* text accompanying notes 80-115 (discussing the equal protection arguments in the *Cossack*, *Palazzolo* and *WNEK* opinions).

53. The traditional reasons are cited in Cossack v. City of Los Angeles, 11 Cal. 3d 726, 736-737, 523 P.2d 260, 267, 114 Cal. Rptr. 460, 467 (1974) (Burke, J., dissenting) (quoted, in part, in text accompanying note 85).

54. WNEK Vending & Amusements Co v. City of Buffalo, 434 N.Y.S.2d 608, 613 (N.Y. Sup. Ct. 1980).

55. Analogous argument made to bring pinballs within claim for equal protection in Cossack v. City of Los Angeles, 11 Cal. 3d at 734-35 (1974).

56. *See, e.g.*, WNEK Vending & Amusements Co. v. City of Buffalo, 434 N.Y.S.2d 608, 617 (N.Y. Sup. Ct. 1980); State v. Bloss, 613 P.2d 354, 358-360 (Hawaii 1980).

57. *See, e.g.*, Malden Amusement Company v. City of Malden, No. 82-1840-S, slip op. (D. Mass. 1983); America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982).

58. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975).

59. McCollester v. City of Keene, 514 F. Supp. 1046, 1051 (D.N.H. 1981), *rev'd*, 668 F.2d 617 (1st Cir. 1982).

dividuals under the law have not been accorded to minors as a group.[60] Statutes abridging the rights of juveniles to move freely at night[61] or to act independently in private matters[62] have not been given the strict scrutiny which would be afforded to such statutes were they directed at minorities[63] or aliens.[64] No "compelling state interest"[65] must be shown for age-based ordinances;[66] if challenged, such ordinances must only bear a reasonable relationship to the public interest in the health, welfare and safety of the community.[67]

Thus, ordinances which prohibit minors from the playing of video games,[68] deny them access to arcades[69] or generally restrict their hours of recreational freedom[70] may, without much difficulty, retain their presumptive validity under the police power. Such laws have only been the subject of strict scrutiny in the Fifth Circuit.[71] The trend toward constitutional criticism of age-based ordinances may, however, spread to other areas of the country if the frequency or intensity of their use

60. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1265 (M.D. Pa. 1975).

61. *Id.*

62. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398 (1981) (analyzing Utah statute requiring physician to notify parents of unemancipated minor's forthcoming abortion only in terms of its reasonable relationship to a legitimate state interest).

63. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (strict scrutiny accorded state miscegenation law).

64. For an example of a law aimed at aliens receiving strict scrutiny see Graham v. Richardson, 403 U.S. 365 (1971); *but see* Ambach v. Norwick, 441 U.S. 68 (1979), in which a law concerning alien teachers refusing to seek naturalization was subject only to a rational basis test (i.e., the law must bear a rational relation to the public interest to be valid).

65. This is the traditional statement of the strict scrutiny test. *See generally* Yick Wo v. Hopkins, 118 U.S. 356 (1886); *Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 646 (1975) (digesting the rules of San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (as to when strict scrutiny is appropriate method of review).

66. *See* Johnson v. City of Opelousas, 658 F.2d 1065, 1072-73 (5th Cir. 1981) (recognizing that strict scrutiny test need not be applied and urging that the standard of the plurality of *Bellotti v. Baird* (*see infra* text accompanying notes 133-134) be adopted; McCollester v. City of Keene, 514 F. Supp. 1046, 1050 (D.N.H. 1981).

67. *See, e.g.*, Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, at 1255 (M.D. Pa. 1975).

68. *See, e.g.*, Rothner v. City of Des Plaines, No. 81-C2669, slip op. (N.D. Ill. Sept. 11, 1981); Aladdin's Castle, Inc. v. Village of North Riverside, 383 N.E.2d 1316 (Ill. 1978).

69. *Id.*

70. *See, e.g.*, Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975).

71. *See, e.g.*, Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981); Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980). The Fifth Circuit also accords strict scrutiny to laws abridging freedom of association as an independent first amendment guarantee, *see* Sawyer v. Sandstrom, 615 F.2d 311, 315-16 (5th Cir. 1980).

increases.[72]

The interplay of these constitutional issues in the recent regulation of video games and in the earlier regulation of pinball machines, bowling alleys and pool halls through anti-gambling, curfew and licensing statutes is the subject of the following sections of this note.

III
Anti-Gambling Ordinances

The current use of anti-gambling ordinances to prohibit video games is similar to the use once made of anti-gambling ordinances to prohibit pinball machines. Pinballs machines are the modern amusement device most directly analogous to video games. Both are coin-operated devices, both provide free replays for "high score . . . attained," and both are ostensibly designed only for amusement.[73]

Many early decisions held that coin-operated pinball machines, though offering no remuneration and though not intended to promote betting, could be prohibited by anti-gambling ordinances.[74] In most instances, the anti-gambling statutes were interpreted as measures to remedy social and moral problems and were broadly construed to prohibit pinball machines as games of chance which promoted social and moral decay.

People v. Gargiulo[75] illustrates such an attitude. In *Gargiulo*, the New York Court of Appeals found that even pinball machines used only for amusement could be the object of anti-gambling prohibitions. Justifying this rather harsh conclusion, the court wrote that the anti-gambling ordinances directed at pinball supported a valid moral purpose:

> It is quite true that these devices may be used for amusement purposes, but it is a well-known fact that . . . they often draw to the stores where operated an element of unsavory reputation. It is also an alarming thing to note that these games frequently invite young children who can ill-afford to squander

72. A similarly demanding analysis was made of a curfew ordinance by the district court in New Hampshire in McCollester v. City of Keene, 514 F. Supp. 1046 (1981), however, the opinion was reversed by the First Circuit the following year.

73. *See generally* Annot., 89 A.L.R.2d 815 (1963).

74. *See, e.g.*, cases gathered by state in annotation at 135 A.L.R. 104 (1941); 89 A.L.R.2d 815 (1963); King, *The Rise and Decline of Coin-Machine Gambling*, 55 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 199 (1964).

75. People v. Gargiulo, 164 Misc. 39, 298 N.Y.S. 951 (N.Y. Magis, Ct. 1937).

> the money their parents allow them for their lunches and other expenses. The records of the police department and the Children's Court indicate that in some cases children addicted to this form of gambling are driven to petty thievery in order to obtain the nickels necessary to play these games. It is extremely important that the activities of children be diverted from these gambling devices if they are to be kept away from paths leading to crime. If a strict enforcement of this statute does nothing else than keep young children from becoming gamblers in the future, the best "interests" of society will be served.[76]

The same moral outrage that youthful "addiction" to pinball provoked in the New York Court of Appeals in 1937 was shared by a large number of American jurisdictions from 1920 and 1960.[77] Gradually, however, the attitude toward pinball play changed. Significantly responsible for this change in attitude was the change in pinball games themselves. Over the years pinball machines progressed from games of pure chance, similar to coin-operated slot machines, to games in which a player's skill at using flippers and other technological enhancements accounted for the prize of free replays. The games thus took on some of the characteristics of other legitimate sporting contests such as bowling.[78] With skill as a large factor in the high scores achieved, anti-gambling ordinances designed to prohibit games of chance no longer seemed the appropriate regulatory device for pinball.[79] *Cossack v. City of Los Angeles*[80] is representative of the modern attitude toward pinball. In *Cossack*, the Supreme Court of California invalidated a Los Angeles Municipal Code provision on the ground that it violated article XI,

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76. 298 *N.Y.S.* at 954.

77. *See* Annot., 89 A.L.R.2d 815, 847-852 (1963).

78. *See* King, *supra* note 73, at 202.

79. *See* City of Ferndale v. Palazzolo, 233 N.W.2d 216 (Mich. 1975); State v. Bloss, 613 P.2d 354 (Hawaii 1980); Cossack v. City of Los Angeles, 523 P.2d 260 (Cal. 1974). There have been two notable exceptions to this general proposition: State v. Pinball Machines, 404 P.2d 923 (Alaska 1965) (in which the court's analysis of pinball machines and gambling devices found a critical similarity between them in the offerings of prize, chance and price; and thus, pinball machines were validly prohibited in Anchorage and Fairbanks); and, Total Vending Services, Inc. v. Gwinnett County, 157 Ga. App. 28, 276 S.E.2d 89 (1981) (local ordinance outlawing the possession of pinball games not repealed by State of Georgia's general statute exempting amusement devices from criminal gambling statute).

80. Cossack v. City of Los Angeles, 11 Cal. 3d 726, 523 P.2d 260, 114 Cal. Rptr. 460 (1974). Plaintiffs in this case were an operator of coin-amusement games, an owner of a bowling center and the Assistant Dean of the UCLA School of Law, 11 Cal. 3d at 728 n.1.

section 7 of the California Constitution.[81] The ordinance prohibited the maintenance of all "pin games" in public places.[82] It made no distinction between those devices which could be characterized as games of chance and those in which skill was the dominating factor. The court held that for the ordinance to be valid, a distinction should be made. Contrivances which resembled gambling or slot machines because of their reliance on pure chance should be regulated in separate ordinances from those devices, equipped with flippers, which permitted a player to manipulate a ball and to use skill to achieve a "payoff" of additional plays. As the ordinance in question made no such distinction, the court found that it arbitrarily discriminated against legitimate games of skill.[83] The court reasoned that the law was no longer serving the purpose for which it was intended. It was being used to prohibit modern, flipper-style pinball machines while its purpose was only to limit the number of chance-dependent devices in commercial establishments.[84]

In his dissent to *Cossack*, Judge Burke revived a moral argument similar to that used to buttress *Gargiulo* and many earlier anti-pinball decisions. Judge Burke stated that:

> [P]inball and other coin-operated games of this nature "frequently are gambling devices or readily converted into such by a mere mechanical adjustment or by their use for wagering" . . . . These games are particularly tempting to children and reasonably may be viewed as a notorious waste of both time and money, encouraging loitering, gambling and other unproductive habits. . . . Finally, unlike . . . sports activities . . . pinball games involve essentially no physical activity whatever, and cannot be justified as promoting either physical fitness or good sportsmanship.[85]

Burke's dissent concluded that the City of Los Angeles could legitimately limit the number of "unproductive" and poten-

81. Article XI, section 7, of the California Constitution reads: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." In 1950, the legislature of the state of California adopted extensive legislation with respect to gambling machines or devices. Cal. Penal Code section 330b, subdivision 4 expressly excluded pinball from its list of enumerated gambling devices. 11 Cal. 3d at 731 n.4.

82. 11 Cal. 3d at 731.

83. *Id.* at 735.

84. *Id.* at 732-34.

85. *Id.* at 736 (Burke, J., dissenting) (citations omitted).

tially immoral devices within its business establishments.[86]

In *City of Ferndale v. Palazzolo*,[87] a 1975 pinball case, the constitutional issues raised by the use of anti-gambling statues to prohibit pinball machines were again clearly set forth. In *Palazzolo*, the Michigan Court of Appeals examined a 34-year old City of Ferndale ordinance[88] prohibiting the maintenance of "any game of skill or chance or partly of skill and partly of chance, used or capable of being used for gaming."[89] The 1931 ordinance was being used in 1975 to prevent commercial establishments from keeping pinball machines. The court came to the conclusion that the language of the ordinance was antiquated and its current use unjustified, noting that: [t]he language of the ordinance has remained the same, while the condition of the world, or at least the condition of pinball machines, has changed."[90] The court contrasted the average pinball machine of the 1940's, commonly a game of pure chance, often rigged to be used as a gambling device, with modern pinball machines of the 1970's stating that:

> Modern pinball machines involve skill to a much greater extent because of the addition of "flippers". . . . Attaining a high score in the old-style flipper-less game depended almost completely on chance. A modern pinball machine, however, armed with one or more pairs of flippers, allows for a much greater variance in scores, depending on the player's skill in manipulating the flippers.[91]

The Michigan court also found the ordinance in question vague and ambiguous. Its phrasing allowed Ferndale to outlaw all gaming and pinball machines regardless of type.[92] While the ordinary businessman might assume that modern, flipper variety machines were games of skill, the ordinance did not

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86. The majority, however, took a less passionate stand in declaring the Los Angeles statute void.

87. City of Ferndale v. Palazzolo, 62 Mich. App. 140, 233 N.W.2d 216 (1975).

88. Section 2 of FERNDALE, ILLINOIS, ORDINANCE 200 read as follows:

> No person, his agent or employee, shall for hire, gain or reward, keep or maintain in a place of business in the City of Ferndale a gaming room or a gaming table or any game of skill or chance, or partly of skill and partly of chance, used or capable of being used for gaming. . . . Games such as 'box-ball' or 'pin-ball' machines, so-called, are hereby declared to come under the prohibition herein contained.

233 N.W.2d at 217-218.

89. *Id.*

90. *Id.* at 218.

91. *Id.*

92. *Id.*; *see also supra* text accompanying notes 52-54.

distinguish such pinball machines from others. The court concluded that the ordinance did not meet the "due process standards required" of a local statute, stating that:

> In light of the changes which have taken place in the last 30 years in the field of coin-operated amusement machines, we must conclude that the ordinance is vague and ambiguous because it does not inform the citizen with reasonable precision what acts it intends to prohibit.[93]

In addition, the *Palazzolo* court declared invalid clauses of the Ferndale ordinance which attempted to prohibit pinball by merely creating artificial distinctions between automated amusements and semi-manual forms of entertainment such as billiards and bowling.[94] The court found that the guarantee of equal protection under the Constitution mandated that "lawmakers must treat like things in a like manner."[95] In the court's view critical examination of the permitted game of bowling established its distinct commonality with the prohibited game of pinball.[96] Both were games of skill and had as their reward "free throws of the ball,"[97] similarities that led the court to conclude that "exempting one of them from the prohibition of the ordinance, while including the other, [was] a violation of equal protection of the laws."[98]

Although few would quarrel with the ultimate determination by the *Palazzolo* court that Ferndale's anti-gambling ordinance could not be used to prohibit pinball machines, the court's pinball/bowling analogy seems somewhat tenuous. Pinball has never really been considered a sport. It is not a physical activity in the same sense as bowling. One does not win an "extra roll" of a pinball, just a free ball. The game of bowling is limited, usually, to twenty-two rolls as an essential part of its scoring, whereas one may continue to play the same pinball game almost indefinitely. Still, the court's emphasis on the importance of a player's skill and its recognition of changing social attitudes toward pinball play make the *Palazzolo* opinion seem a reasonable evaluation of an outmoded ordinance.

Most modern jurisdictions have similarly overruled the use of anti-gambling ordinances as devices to control pinball

93. 233 N.W.2d at 219; *see also supra* text accompanying notes 18-19.
94. 233 N.W.2d at 220.
95. *Id.*; *see also supra* text accompanying notes 49-57.
96. 233 N.W.2d at 220.
97. *Id.*
98. *Id.*

play.[99] However, recent concerns, very much like those expressed in the *Gargiulo* opinion, about misspent lunch money, the undesirable atmosphere of arcades and youthful addiction to amusement,[100] have prompted some communities to revive anti-gambling ordinances in a new war on video games.

WNEK Vending & Amusements Co. v. City of Buffalo[101] is an opinion reviewing the recent attempt by the City of Buffalo to deny video game licenses under an anti-gambling ordinance. In declaring the use of such ordinances invalid, the New York court used an analysis similar to that of the pinball cases, *Cossack*[102] and *Palazzolo*,[103] but added its own complete examination of the video game phenomenon.[104]

The *WNEK* court based its determination that an anti-gambling statute was an inappropriate regulatory device for video games on three contentions. First, that video games could not be considered gambling devices because skill rather than chance "predominates in the operations of the machine."[105] Second, that police abused their power to regulate when their standard of review was outmoded and inflexible.[106] And, third, that attempted law enforcement which is neither even-handed nor rationally connected to a legitimate community purpose should be discontinued.[107]

To support its first contention, the *WNEK* court made an elaborate inquiry into the nature of video games.[108] It noted

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99. *See* Annot., 89 A.L.R.2d 815 (Supp. 1982).

100. *See Games That Play People*, *supra* note 1, at 51-53.

101. WNEK Vending & Amusements Co. v. City of Buffalo, 107 Misc. 2d 353, 434 N.Y.S.2d 608 (N.Y. Sup. Ct. 1980).

102. *See supra* notes 80-86 and accompanying text.

103. *See supra* notes 87-98 and accompanying text.

104. *See, e.g.*, material at 107 Misc. 2d at 356, 434 N.Y.S.2d at 612.

> The SPACE INVADERS model which Petitioners seek to license is representative of . . . video games. . . . The SPACE INVADERS are actually projectiles which move vertically at uniform speeds from top to bottom of the video screen which is immediately in front of the player. The INVADERS can shoot back at the player and when such shots occur, a sound is emitted and the shot is visible on the video screen.

105. 434 N.Y.S.2d at 616.

106. *Id.* at 615.

107. *Id.* at 616-617.

108. *Id.* at 612-13. Explaining how it managed to derive so intimate an acquaintance with the nature of video games the court wrote:

> The Court realized that it could not fully understand the exact nature and operation of the video games from the testimony of the witnesses. Counsel requested that the Court view the machines at the warehouse of one of the Petitioners. The Court refused and suggested that Petitioners bring the ma-

the amount and sophistication of the video gadgetry which physically distinguished the games from devices of mere chance. It recognized that this physical complexity also made it almost impossible for proprietors to alter the nature of the games to serve illegal ends.[109] Finally, it observed that the electronic intricacy of video games demanded a high degree of player skill and imput—important factors removing the games from the category of chance-dependent gambling devices. The court stated that games like "Space Invaders":

> depend upon eye-hand coordination, reflexes, muscular control and above all, concentration. Proper timing in aiming and firing is essential. The eyes and hands of an operator are in constant motion. The player must continually adapt to instantaneous changes in the position of his laser base relative to the location of the invader projectiles. The amount of physical skill and energy required to successfully play a video game is enormous.[110]

The combination of all these factors led the *WNEK* court to categorize video games as non-gambling devices, and thus outside the ambit of the Buffalo ordinance.

Additionally, the court found that the City of Buffalo was engaging in an "arbitrary and capricious" exercise of administrative discretion[111] by prohibiting video games without being fully acquainted with the nature of video play. The court stated that if the City had bothered to investigate the use of video games it would have found that video play was remarkably similar to other coin-amusement activity already permitted.[112] The devices in question were directly analogous to

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> chines into Court. The operation of four video games . . . and one bowling game . . . was described and demonstrated by both an experienced player and a novice.

434 N.Y.S.2d at 611. The opening paragraphs of the opinion lead the reader to believe that, perhaps, the novice demonstrator was the author of the opinion, Judge Green.

109. "The number of laser bases in a game can be changed by the manufacturer by adjusting a dipswitch in the logic board but all the logic boards in SPACE INVADERS have been set for three laser bases and cannot be changed once they are distributed." 434 N.Y.S.2d at 612.

110. *Id.* at 612-13.

111. *Id.* at 615. Indeed, one of Buffalo's commissioners responsible for licensing amusements testified that he had never operated any video games and did not know how they worked.

112. Judge Green went through a seven point analysis of both the electronic bowling devices already permitted and video games. He found a substantial matching in both their physical characteristics and in the skill demanded to play: "I find that the similarity between the operation and extended play features of coin-operated video games and bowling games is substantial . . . ." *Id.* at 613.

mechanical bowling devices which had previously been classified as games of aptitude and coordination by the Buffalo City Council.[113]

Most importantly, the *WNEK* court felt that the use of an anti-gambling ordinance to prohibit video games denied the Buffalo community an entertainment resource that was widely recognized as acceptable elsewhere.[114] The court took a broad view of the importance of video games in noting that they were not backroom amusements, but omnipresent, reputably sponsored and extravagantly popular games. "Thus, the contemporary context in which video games are manufactured, distributed and operated bears little resemblance to the Buffalo atmosphere in 1952 [the effective date of Buffalo's anti-gambling, anti-coin device ordinance]."[115] The New York court found that strong practical, administrative and social reasons all militated against the use of anti-gambling ordinances to regulate video games.

Although not every modern jurisdiction can be expected to give the same enthusiastic support to video games, it seems unlikely that many will use anti-gambling ordinances to regulate them. The nature of the activity,[116] the critical case law in pinball regulation, and the respectable attention video games

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113. The Buffalo City Council operated under an extremely broad ordinance defining gambling devices:

> A machine, slot machine, apparatus, paraphernalia or device whether manually, mechanically, electrically or otherwise operated, in or upon which a game or contest involving an element of chance may be played . . . upon and as the result of, the insertion of a piece of money or coin, or other object for which a fee, charge, or other consideration is imposed directly or indirectly.

CITY OF BUFFALO, N.Y., ORDINANCE, ch. VIII, § 27(1)(a), 434 N.Y.S.2d at 612. Thus, it was up to the individual knowledge and familiarity of each council person to determine whether or not a device should be classed as a gambling device or a legal amusement.

114. Today, coin-operated video games are distributed to shopping malls, movie theatres, bowling alleys, roller rinks, pizzerias, and neighborhood grocery stores. Video games, originally introduced in Japan several years ago and mass-marketed in this country for the last eighteen months, have recently been adapted for use on television screens for home entertainment. A recent SPACE INVADERS competition in New York City, sponsored by a reputable manufacturer and distributor of video games, attracted over 4,000 entrants and awarded as the grand prize, not surprisingly, a $2,000 ASTEROIDS table top video game.

434 N.Y.S.2d at 617.

115. *Id.*

116. As described in *WNEK* and Stern Electronics, Inc. v. Kaufman, 523 F. Supp. at 638-39.

have received in the media and elsewhere[117] are persuasive factors indicating that anti-gambling ordinances will not be the appropriate regulatory device for video games.

IV
Age-Based Ordinances

A second means of regulating amusement centers and video arcades is age-based and curfew ordinances. These ordinances prohibit youths from certain activities or public places or confine youths to certain hours of recreational freedom.[118] The restrictions these ordinances impose upon teenagers may impinge upon constitutionally protected rights and have been a fertile source of controversy between commercial interests and communities. Among the arguments proferred by the former are: a) denying teenagers access to video games unfairly limits their first amendment right of expression by obstructing access to entertainment;[119] b) denying access to a video arcade abridges teenagers' first amendment right of association by depriving them a place to meet with others;[120] and c) legislating the amount of time that may be spent in seeking diversion outside the home sets an inflexible community standard which interferes with personal family decision making and discipline.[121]

The Fifth Circuit in *Aladdin's Castle, Inc. v. City of Mesquite*[122] grapples with some of the constitutional issues raised

117. *See generally* Bernstein, *supra* note 1, at 40; Goode, *When Video Games Can Help Out*, San Francisco Chron., Feb. 15, 1982, at 16, col. 1; San Francisco Chron., Apr. 5, 1982, at 2, col. 5. Indeed, the City of San Jose has installed video games in its superior court to amuse those who must wait. But the exact opposite has happened in the Philippines where all video games were ordered to be destroyed. Eastbay Today, Nov. 20, 1981, at 1, col. 1.

118. *See, e.g.*, ordinances discussed in Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981) (curfew ordinance); Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980) (minors restricted in use of arcades); Rothner v. City of Des Plaines, No. 81-C2669, slip op. (N.D. Ill. Sept. 11, 1981) (confining video games to licensed liquor establishments); McCollester v. City of Keene, 514 F. Supp. 1046 (D.N.H. 1981) (curfew ordinance); Aladdin's Castle, Inc. v. Village of North Riverside, 383 N.E.2d 1316 (Ill. 1978) (minors restricted in use of arcades).

119. *See supra* note 23.

120. *See supra* note 24.

121. This is an argument which appears in Johnson v. City of Opelousas, 658 F.2d at 1074 (5th Cir. 1981); Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d at 1043 (5th Cir. 1980); McCollester v. City of Keene, 514 F. Supp. at 1052 (D.N.H. 1981).

122. Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir.), *reh'g en banc denied*, 634 F.2d (5th Cir. 1980), *rev'd in part and remanded*, 455 U.S. 283 (1982).

by an age-based ordinance restricting video game play. The City of Mesquite ordinance stated:

> It shall be unlawful for any owner, operator or displayer of coin operated amusement machines to allow any person under the age of seventeen (17) years to play or operate a coin operated amusement machine unless such minor is accompanied by a parent or legal guardian.[123]

The purpose of the ordinance was to halt truancy and prevent children from contact with adults "who promote[d] gambling, sale of narcotics and other unlawful activities."[124]

The court in evaluating the validity of this ordinance first asked if it seemed likely to prevent truancy in the most appropriate manner. To this they answered no, stating that: "Barring young people from all coin-operated amusement devices at times and on days when school is closed simply bears no relation whatever to the city's alleged interest in eliminating truancy."[125] Additionally, the court reasoned that: "Before such centers existed, children found places and opportunities for truancy, and they would find places were such centers to become extinct."[126]

Next, the court looked at the ordinance's avowed purpose of protecting children from exposure to corrupting influences. Here, evidence presented by Mesquite in the district court[127] failed to persuade the court of appeals that the adults likely to expose youngsters to gambling and narcotics had a distinct tendency to frequent video arcades. The court came to a conclusion that persons interested in corrupting youth would be drawn to the amusement centers not by the machines, but rather by the children.[128] The statute served no real purpose as a deterrent if such persons were just as likely to follow children elsewhere, "the schoolyard, the nearby street corner, the movies, the local fastfood establishment, the parking lot, the concert, the park, or the beach."[129]

Contrasting the avowed purpose of the ordinance with the

123. CITY OF MESQUITE TEXAS ORDINANCE NO. 1103, § 3, *quoted in* Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d at 1033 n.2 (1980).

124. 630 F.2d at 1039.

125. *Id.*

126. *Id.* at 1040.

127. "The district court recognized, as we do, that the city presented no evidence that such people ever come to these centers." 630 F.2d at 1040.

128. *Id.*

129. *Id.*

type of operation run by Aladdin's Castle, the court of appeals seemed almost predisposed to rule in favor of the commercial enterprise. The court's statement of facts begins with the following glowing assessment:

> Aladdin's Castle, Inc. owns and manages approximately one hundred family amusement centers throughout the United States, including three centers in Texas. Typically located in suburban shopping areas, each Aladdin's center contains a variety of coin-operated amusement devices. Adults run and supervise the patrons' use of these centers. Their duties include the enforcement of Aladdin's rules prohibiting loitering, gambling, smoking, and the consumption of food, non-alcoholic drinks and alcoholic beverages on the premises. These rules exist in all such centers operated by Aladdin's. Aladdin's Castle also enforces a rule that bars school children from the establishment during school hours.[130]

Part of the court's displeasure with the Mesquite ordinance seems motivated by its conviction that Aladdin's Castle engaged in decent, self-regulating behavior as a proprietor of arcades.

The court's overwhelming concern in evaluating the ordinance, however, was not in the propriety of applying it to Aladdin's Castle but in the suitability of using it to control young people. The Fifth Circuit perceived the age-based ordinance as an unfair burden on youth's right, guaranteed by the first and fourteenth amendments, of free association.[131] It thus undertook an extended examination of the evolving doctrines of protection for social association and minors' rights to equal protection under the law.[132]

In its discussion of the latter, the court scrutinized the Mesquite ordinance in light of Justice Powell's opinion in *Bellotti v. Baird*.[133] In *Bellotti*, the United States Supreme Court held unconstitutional a Massachusetts law which required, in every instance, a minor to seek adult—either parental or judicial—approval before obtaining an abortion. In his judgment for the Court, Justice Powell set forth a test describing three valid reasons why a state might be empowered to restrain and protect minors in a manner "which would be unconstitutional if applied to adults." Justice Powell designated "[t]he particular

130. *Id.* at 1032.
131. *Id.* at 1041-42; *see also supra* notes 30-40 and accompanying text.
132. *See supra* notes 30-40 and 58-72 and accompanying text.
133. Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion).

vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing,"[134] as important considerations to use in evaluating the validity of legislation directed at youth.

In applying the *Bellotti* three point test to the amusement centers ordinance, the *Aladdin's Castle* court found that the restraint on Mesquite's children was not justified. The ordinance did not really protect children from an established vice, nor did it aid them in an essential moral dilemma. The court observed: "that they can be barred from making the 'critical decision' of whether or not to deposit a quarter in a coin-operated amusement device is not a proposition that deserves serious consideration.[135] In the eyes of the court, the ordinance was an unworthy substitute for parental judgment: it was burdensome for parents who might wish to send their children to an arcade for amusement and bothersome to parents in their role as arbiters of family discipline.[136]

The appellate opinion ended with a strong plea for liberty and freedom from "governmental regimentation encompassing virtually every facet of a citizen's life."[137] The court held that the Mesquite age-based ordinance neither served the purpose of protecting children nor preserved their constitutional rights. The law was therefore declared "constitutionally offensive," and in violation of the constitutional guarantees of "liberty and personal autonomy."[138]

In its review of this appellate decision,[139] the United States Supreme Court refused to consider the constitutional issues revolving around the age-based limitation on video play. Instead the Court confined its consideration to the licensing clause prohibiting video game operators from having "connections with criminal elements."[140] Justice Stewart, writing for the Supreme Court, gave two reasons why the age-based ordinance was not receiving review. First, the Texas Constitution contained language which made its guarantees of equal protec-

134. *Id.* at 634.
135. 630 F.2d at 1043.
136. *Id.* at 1044.
137. *Id.* at 1046.
138. *Id.*
139. City of Mesquite v. Aladdin's Castle Inc., 455 U.S. 283 (1982).
140. For a discussion of this aspect of the case see *infra* notes 185-191 and accompanying text.

tion broader than those of the federal Constitution,[141] and "[a]s a number of recent Supreme Court decisions demonstrate, a state court is entirely free to read its own constitution more broadly than this court reads the federal Constitution, or to reject the mode of analysis used by this Court in favor of a direct analysis of its corresponding constitutional guarantee."[142] Justice Stewart also noted that it was the policy of the Court to avoid unnecessary adjudication of federal constitutional questions whenever reasonably possible. He stated: "No reason for hasty decision of the constitutional question presented by this case has been advanced. If Texas law provides independent support for the Court of Appeals' judgment, there is no need for decision of the federal issue."[143]

Justice Powell,[144] concurring in part and dissenting in part, wrote that it was time the Supreme Court considered the constitutionality of age-based ordinances which may abridge youth's right to free speech and association under the first amendment.[145] There are several reasons, however, why a majority of the Supreme Court did not choose *City of Mesquite v. Aladdin's Castle, Inc.* as a definitional case. Although the age-based ordinance at issue was capable of discouraging teenagers from assemblage and association, freedom of association has typically been extended only to those gatherings devoted to the advancement of beliefs and ideas.[146] While there is no doubt that when minors seventeen and under congregate to play video games they are, indeed, assembled in one amusement center, few cases support the notion that the constitutional freedom of assembly or association "extends to a congregation of persons engaged in mere physical activity or self amusement."[147]

Furthermore, the argument that the playing of video games is entertainment or amusement worthy of free speech protection under the first amendment has its weaknesses.[148] Free

141. 455 U.S. at 293.

142. *Id.* at 294-295.

143. *Id.*

144. 455 U.S. at 297.

145. *Id.* at 298.

146. *See* Sunset Amusement Co. v. Bd. of Police Comm'rs of Los Angeles, 7 Cal. 3d 64, 74 (1969); *see also infra* notes 30-40 and accompanying text; *accord* Caswell v. Licensing Commission for Brockton, 387 Mass. 864, 444 N.E.2d 922 (1983).

147. Sunset Amusement Co. v. Bd. of Police Comm'rs of Los Angeles, 7 Cal. 3d 64, at 74 (1969) (discussing freedom of teenagers to associate in roller rink).

148. *See supra* notes 27-29 and accompanying text.

speech protections typically concern the exchange of ideas;[149] it is doubtful that the playing of video games encourages the flow of ideas or would logically come within the protections of the first amendment.[150] The elements of other protected communications, such as movies,[151] dancing[152] and political speech[153] are missing here.

The unresolved constitutional issues presented by age-based limitations on youth activities will probably not prevent communities from seeking to regulate video games through curfews and other age-based prohibitions. It is likely, however, as long as video games remain attractive to teenagers and profitable to commercial interests, and until the Supreme Court makes a final determination regarding the first amendment protections that should be afforded minors or games, that age-based ordinances will continually put communities in conflict with youths, commercial entrepeneurs and parents.

V
Licensing Statutes

We've got trouble my friends,
I say trouble,
With a capital T,
And that rhymes with P,
And that stands for pool.[154]

With that lyric Meredith Willson's fast talking "Music Man" jauntily exploited the fears of an earlier America, when parents, town councilmen and the police disapproved of the habit of young men meeting in pool halls for a bit of snooker, a peek at the latest naughty magazine, and perhaps a smoke. Today's parents are similarly dismayed that teens gather, spend money and expend leisure time in video arcades.

Concern for the moral and social values of youth has been reflected in several community licensing statues which restrict the number, location of and supervision of youth amusement centers. Because licensing statutes are flexible enough to be

149. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556-558 (1975).
150. America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (S.D.N.Y. 1982).
151. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
152. *See, e.g.*, Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).
153. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958).
154. M. WILLSON, THE MUSIC MAN (1957).

tailored to a variety of community policing needs[155] they have always been a popular regulatory device.

In the early part of this century, licensing statutes prohibiting pool halls from occupying certain sections of a community were often upheld as a valid exercise of local police power.[156] Unless the ordinances were clearly unreasonable or overbroad, the courts respected the judgment of local governments in restricting pool room operations. Many courts acknowledged that "public pool parlours [could] be the situs of gambling, lotter[ies] or . . . the purveying or use of drugs."[157] Thus licensing statutes regulating pool room use, location or ownership were almost automatically presumed to be valid social and moral tools.

For example, in *Murphy v. California*,[158] the United States Supreme Court upheld a community ordinance limiting the location of pool tables to licensed hotels. The Court rejected evidence that the independent parlour in question was lawfully run and free from anything which could affect the morality of the community or its patrons.[159] The Supreme Court stated that such testimony was irrelevant. The Court reasoned that the very act of keeping a billiard table had a harmful tendency, and community authorities could take legislative notice of "the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation."[160]

In the years following *Murphy*, the social attitude toward pool and billiards changed. Several courts invalidated local licensing statutes limiting pool room operations.[161] These courts looked past the moral arguments against pool playing and concentrated on the maintenance of a pool room as a valid occupa-

155. *See, e.g.*, City of Mesquite v. Aladdin's Castle, Inc. 455 U.S. 283 (1982) (restricting the persons who may operate amusement centers); Rothner v. City of Des Plaines, No. 81-C2669, slip op. (N.D. Ill. Sept. 11, 1981) (restricting the location of video games); Aladdin's Castle, Inc. v. Village of North Riverside, 383 N.E.2d 1316 (1978) (restricting number of machines and adolescent play).

156. *See generally* Annot., 100 A.L.R.3d 257-58 (1980).

157. Tillberg v. Township of Kearney, 103 N.J. Super. 324, 247 A.2d 161, 164 (1968).

158. Murphy v. California, 225 U.S. 623 (1912).

159. *Id.* at 628.

160. *Id.* at 629.

161. *See, e.g.*, City of Meadville v. Caselman, 240 Mo. App. 1220, 227 S.W.2d 77 (1950); O'Connor v. City of Moscow, 69 Idaho 37, 202 P.2d 401 (1949); Taylor v. City of Tallahasse, 13 Fla. 418, 177 So. 719 (1937).

tion in and of itself.[162] The courts began to apply an equal protection theory, reasoning that

> the operation of a pool hall was neither inherently bad nor detrimental to the morals of the community [and] that a municipality's power to grant, refuse, or revoke licenses to carry on a lawful business was subject to an implied condition that such [a] determination [was] not . . . made arbitrarily or in contravention of statutory and constitutional provisions requiring all applicants be treated alike.[163]

Community concerns that a pool hall would bring crime and other social ills to an area were not considered adequate grounds for denying an otherwise legitimate business a license to operate.

The recent case of *Roy v. Augusta*,[164] epitomizes the modern attitude toward pool hall operations. In *Roy*, the Supreme Court of Maine scrutinized a local law regulating amusement centers which stated that a "license shall be granted only if the location is in such a place that it will not disturb the peace and quiet of a family. . . ."[165] Relying on this ordinance, city officials refused to reissue a billiards license to Roy because youths liked to gather in large numbers on the streets outside his pool room. The youths outside the hall often did create disturbances to families in the area, but there was no evidence that anything going on inside the pool room was disruptive.[166]

In regranting an amusement center license to Roy, the Maine court traced the history of billard regulation to a time in the 19th century when the playing of pool was considered morally wrong.[167] But, the moral climate of Maine had changed in the last one hundred years and the Maine Supreme Court observed:

> [B]owling and playing billiards [now] weigh much differently

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162. 100 A.L.R.3d 252, 258-60 (1980).

163. *Id.*; *see also supra* notes 49-57 and accompanying text.

164. Roy v. City of Augusta, 387 A.2d 237 (Me. 1978).

165. Part of the AUGUSTA, MAINE, CITY ORDINANCE § 3-7 (1957):

> Bowling alleys, shooting galleries, pool, billiard rooms—license required prerequisites.
>
> a) No person shall operate a bowling alley, shooting gallery, pool or billiard room without obtaining a license from the municipal officers.
>
> b) Such license shall be granted only if the location is in such a place that it will not disturb the peace and quiet of a family, and such license shall be renewed on or before the first day of May annually.

Quoted in 387 A.2d at 238.

166. *Id.* at 240.

167. *Id.* at 238-39.

> in our scale of values; they are acceptable, and indeed respectable, as beneficial recreational pursuits. Thus regarded, these activities have no greater likelihood of being accompanied by incidents arising on a public sidewalk, or street, outside the confines within which the activity is conducted than various other activities of recreation, or amusement, for which there is no regulation by licensing as specially directed to avoiding disturbance to family peace and quiet.[168]

Under the court's restrained interpretation, a license could be denied to Roy only if he allowed pool to be played in a disruptive or illegal fashion. Events occurring outside the hall, however, were not the subject of the licensing ordinance and were not under the proprietor's control. The ordinance in question was valid, the court concluded, only in so far as it attempted to regulate the activity of billiards within a billiard room. To hold otherwise would make the law a broad mandate requiring the proprietor be responsible for activities occurring outside the concerns of the occupation for which he is obtaining a license.[169]

Recently, many communities have attempted to enact licensing statutes that limit the number of video game devices in an area,[170] proscribe the type of businesses which may house video devices,[171] or describe the character of person who may operate a video arcade.[172] These licensing ordinances have met with some degree of success in the courts and seem to be the most flexible and easily enforceable means of community regulation.

For example, *Aladdin's Castle, Inc. v. Village of North Riverside*[173] represents a successful tailoring of a licensing statute to meet the needs of a community. In *Aladdin's Castle*, the operator of an amusement center sought to overcome the presumptive validity of a local ordinance that limited the number of coin-operated devices permitted within designated areas.

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168. *Id.* at 239.

169. *Id.* at 239-40.

170. *See, e.g.*, America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982); Playtime Games, Inc. v. City of New York, 535 F. Supp. 1069 (E.D.N.Y. 1982); Gardiner v. LoGrande, 83 A.D.2d 614, 441 N.Y.S.2d 288 (N.Y. App. Div. 1981); 1001 Plays v. Mayor of Boston, 387 Mass. 879, 444 N.E.2d 931 (1983).

171. *See, e.g.*, Caswell v. Licensing Commission for Brockton, 387 Mass. 864, 444 N.E.2d 922 (1983); Rothner v. City of Des Plaines, No. 81-C2669, slip op. (N.D. Ill. Sept. 11, 1981).

172. *See, e.g.*, City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982).

173. Aladdin's Castle, Inc. v. Village of North Riverside, 383 N.E.2d 1316 (Ill. 1978).

The ordinance called for the owners of coin-operated amusement equipment to purchase a license for each machine owned and to at no time maintain more than ten licensed machines in any one area.[174] Aladdin's Castle fought the statute claiming that North Riverside had no authority to adopt such a restriction and that the limitation unfairly curtailed property rights.[175]

The Illinois Court of Appeals ruled against Aladdin's Castle on both points. The court held that the Village was empowered to regulate coin-operated amusements on any of several broad grounds recognized under Illinois state statutes.[176] The stated objectives of the North Riverside ordinance—the reduction of juvenile truancy and the protection of a community against crime—were valid purposes for local police action under the Illinois state constitution.[177]

Additionally, the court found that the "valid exercise of police power supersedes" private property rights "once an ordinance is found reasonably related to the public health, safety, or general welfare . . . [if] the means chosen are not unduly oppressive."[178] The Village produced extensive testimony that the ordinance was intended to reduce the incidence of juvenile crime and that in so doing the general welfare would be served. The means chosen were not excessive: the ordinance limited only the number of video games, not the devices per se.[179] The court thus concluded that it had no grounds on which to deny the presumptive validity of the local licensing ordinance.

Influenced by the Illinois Court of Appeals decision in *Aladdin's Castle*, a federal district court in *Rothner v. City of Des Plaines*[180] upheld an even more restrictive local ordinance

174. VILLAGE OF NORTH RIVERSIDE, ILLINOIS, ORDINANCE NO. 75-0-16:

> No license shall be issued to any person or for any premises in excess of one (1) license for every 500 square feet or gross floor area for each premise in which said machine or device is located, provided however that no more than ten (10) licenses shall be issued to any applicant or for any premises . . . .

383 N.E.2d 1317.

175. *Id.* at 1318; *see also supra* text accompanying notes 41-45.

176. ILL. REV. STAT. ch. 24, §§ 11-42-2, 11-42-5 (1977) state: "The corporate authorities of each municipality may license, tax, regulate, or prohibit pinball or bowling alleys, billiard, bagatelle, pigeon-hole, pool, or any other tables or implements kept for a similar purpose in any place of public resort." 383 N.E.2d at 1318.

177. *Id.* at 1322.

178. *Id.*

179. *Id.* at 1320.

180. Rothner v. City of Des Plaines, No. 81-C2669, slip op. (N.D. Ill. Sept. 11, 1981).

which allowed electronic games only in establishments licensed to serve liquor.[181] Because Des Plaines, like North Riverside, was authorized under the Illinois constitution to create statutes to regulate for the protection of the public health, safety, morals and welfare and to "license, tax, regulate or prohibit pinball, or bowling alleys, billiard, bagatelle, pigeonhole, pool, or any other tables or implements kept for a similar purpose in any place of public resort,"[182] the court found that Rothner could validly be prohibited from leasing electronic games to grocery stores and other businesses.

The *Rothner* court was unwilling, as many other courts have likewise been unwilling, to tamper with the judgment of the legislature when it could infer that a statute had a valid purpose for its adoption. Looking squarely at the limiting scope of the Des Plaines licensing ordinance, the court reasoned that confining the games to establishments selling liquor would keep those too young to purchase liquor away from the machines.[183] Protecting minors from coin-operated amusements was considered a constitutionally permissible aim in Illinois where the broad mandate provided communities the power to regulate for any purpose connected with the public welfare.[184]

City of Mesquite v. Aladdin's Castle, Inc.[185] provides the most recent amusement center licensing case of major importance. The main thrust of the Supreme Court's opinion in *Mesquite* reviewed that part of a local ordinance which directed the chief of police to deny a license to any applicant known to have "connections with criminal elements."[186] Aladdin's Castle, a subsidiary of Bally Manufacturing and a nationwide operator of arcades had successfully challenged the ordinance in state[187] and federal[188] courts as a vague mandate contravening

181. *Id.*

182. ILL. REV. STAT. ch. 24, § 11-42-2 (1977).

183. No. 81-C2669 (N.D. Ill. Sept. 11, 1981).

184. *Id.*

185. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982).

186. MESQUITE, TEXAS ORDINANCE NO. 1103, § 2.

> Any person desiring to obtain a license for a coin-operated amusement establishment shall apply to the City Secretary . . . . The Chief of Police shall make his recommendation based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishments of those of tender years.

Quoted in Aladdin's Castle v. City of Mesquite, 630 F.2d 1029, 1034 n.6 (1980).

187. City of Mesquite v. Aladdin's Castle, Inc., 559 S.W.2d 92 (Tex. Civ. App. 1977).

both the Texas and federal constitutions.

The Mesquite ordinance was challenged on the grounds that the phrase "connections with criminal elements" violated due process. At issue was whether the ordinance failed to "give individuals fair notice of the conduct proscribed;"[189] and whether or not the phrase "connections with criminal elements" was too vague a standard on which to deny an application for an amusement center's license.

The United States Supreme Court found that the phrase "connections with criminal elements" did not violate due process. It was not intended to proscribe the behavior of the defendant Aladdin's Castle; but rather, it was a directive to the chief of police to further investigate the application of any potential licensee known to have "connections with criminal elements." The Court held that a directive intended to define the conduct of officials rather than citizens could be general in nature, stating:

> The applicant's possible connection with criminal elements is merely a subject that the ordinance directs the Chief of Police to investigate before he makes a recommendation to the City Manager either to grant or to deny a pending application. *The Federal Constitution does not preclude a city from giving vague or ambiguous directions to officials who are authorized to make investigations and recommendations.*[190]

Additionally, the Court found that Aladdin's Castle was free to refute the findings of the chief of police by presenting evidence of good character to the Mesquite City Council. The Mesquite ordinance containing the phrase "connections with criminal elements" was thus neither impermissibly vague nor an impenetrable block to an applicant's right of procedural due process.[191]

The degree of success with which licensing statutes have withstood the scrutiny of courts in cases like *Aladdin's Castle, Inc. v. Village of North Riverside*, *Rothner v. Des Plaines*, and

188. Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980); Aladdin's Castle, Inc. v. City of Mesquite, 434 F. Supp. 473 (N.D. Tex. 1977).

189. The due process clause of the fourteenth amendment and art. I, § 19 of the Texas Constitution, provide: No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land. *Quoted in* 455 U.S. at 292 n.14.

190. *Id.* at 291 (emphasis added).

191. *Id.* at 290-291.

City of Mesquite v. Aladdin's Castle, Inc.[192] will probably not go unnoticed. Communities are likely to use licensing as an important means of controlling video play by youths and others in the future.

This could produce positive results for both the community and for the commercial entrepeneur. Licensing statutes can be written to meet a community's need to restrict the number of permit devices in a certain area,[193] to control the ownership of lucrative commercial establishments dedicated to amusement,[194] and to effectively put owners on notice of the conditions required in return for community commercial endorsement.[195] Enterpeneurs will find that because licenses are issued on an owner by owner basis in a continuing process, they may be more likely to have an opportunity to be heard if a license is denied[196] and that the language of the ordinances involved is less likely to calcify in the manner of the earlier anti-gambling ordinances.[197] Also, because licensing statutes do not entirely curtail the recreational freedom of a certain group, perhaps they will not meet the degree of constitutional criticism that has greeted curfews.[198]

Licensing statutes which have been carefully tailored to serve so many ends in the past can hopefully be just as carefully, and fairly, constructed and worded as to avoid unnecessary constitutional conflicts in the future.

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192. For other licensing ordinances which have successfully weathered the courts see also Malden Amusement Company, Inc. v. City of Malden, No. 82-1840-S, slip op. (D. Mass. 1983); O'Neil v. Town of Nantucket, 545 F. Supp. 449 (D. Mass. 1982); Playtime Games, Inc. v. City of New York 535 F. Supp. 1069 (E.D.N.Y. 1982); America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982); Caswell v. Licensing Commission for Brockton, 387 Mass. 864, 444 N.E.2d 922 (1983); 1001 Plays v. Mayor of Boston, 387 Mass. 879, 444 N.E.2d 931 (1983); *but see* Supercade Cherry Hill, Inc. v. Borough of Eatontown, 428 A.2d 530 (N.J. 1981) and America on Wheels v. Borough of Eatontown, 428 A.2d 532 (N.J. 1981), where licensing statutes which tried to completely ban video games from a community were declared invalid.

193. *See, e.g.*, 1001 Plays v. Mayor of Boston, 387 Mass. 864, 444 N.E.2d 931 (1983).

194. *See, e.g.*, City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982); *see supra* notes 185-191 and accompanying text.

195. *See, e.g.*, O'Neil v. Town of Nantucket, 545 F. Supp. 449 (D. Mass. 1982).

196. *See, e.g.*, America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982) (in which the judge takes note of the mass of litigation that is about to be heard in New York as individual owners and chains debate the New York licensing ordinances).

197. *See supra* notes 73-117 and accompanying text.

198. *See supra* notes 58-72 and accompanying text.

VI
Conclusion

The best means to achieve community regulation of video games and video arcades seems to lie in the individual licensing of machines to community approved operators. In a broader sense, however, some form of self-regulation by those licensed video arcade owners and operators may be the real key to video regulation in a community.

The Fifth Circuit took lengthy note of the type of well-run, self-disciplining arcade Aladdin's Castle maintained[199] before deciding that the constitutional issues were also heavily in its favor. The self-imposed rules of Aladdin's Castle seem an ideal way of making sure youths do not get into trouble, or become exposed to the wrong influences or spend an inordinate amount of free time in pursuit of amusement.

Perhaps, the ideal use of the "police power" in regulating video games would be in a more frequent inspection of actual video game operations to be sure that licensed machines are in use and that owners abide by a reasonable method of self-regulation. Policing by communities "on-the-beat" and in-house may be the real answer to the orderly, non-truant use of video games by young people.

199. *See supra* note 130 and accompanying text.